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## Habitability in Slum Leases

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## HABITABILITY IN SLUM LEASES

The position of the slum tenant is indeed an unenviable one. He is governed by archaic property laws dating from feudal England which are heavily weighted in the landlord's favor and hinder efforts at slum rehabilitation. The slum tenant does not bargain with his landlord, for he cannot meet the landlord on anything approximating equal terms. Without bargaining strength he must accept the landlord's offer as to duration, price, and services. Because of the current housing shortage and his poor economic position, he is often forced to accept premises at the commencement of a tenancy in a condition falling short of habitability. The same housing shortage curtails the indigent tenant's freedom to move when his premises become uninhabitable due to landlord neglect during the tenancy. In addition, pressuring the landlord to improve them often results in retaliatory action against the tenant, usually eviction.

### I. COMMON LAW DEVELOPMENT

By the fifteenth century the lessee had acquired the in rem right to recover possession of the leased land from the lessor or third party interlopers. The lease was then considered mainly a conveyance, giving the lessee possessory rights good against the world, rather than only contractual rights against the lessor.

Lessees in that day were generally engaged in agriculture, making the land, rather than the buildings, of primary importance. The land was "sold" for a term, without any warranty of fitness, and the buildings, ancillary to the land, were transferred in the same way, without any warranty of habitability or fitness. The theory sprang from the lessee's being able to see the premises for himself, along with his ability to make any necessary repairs if he decided to accept the lease. There was "no law against renting a tumbledown house,"<sup>1</sup> any more than there was a prohibition against selling one. Without a covenant to repair, the lessor was not bound to do so during the term. The fact that the lessor voluntarily made some repairs created no duty on his part to make others.<sup>2</sup> Even if the lessor did promise to make repairs, his failure to perform did not excuse the lessee

1. 1 H. TIFFANY, *LANDLORD AND TENANT* § 86, at 557 (1910), citing Erle, C. J., in *Robbins v. Jones*, 15 C.B. 221, 240 (N.J. 1863).

2. 3A G. THOMPSON, *REAL PROPERTY* § 1230, at 133 (repl. 1959).

from his obligation to pay rent.<sup>3</sup> An exception to this *caveat emptor* theory of leases was the covenant of quiet enjoyment, which was implied from the mere relation of landlord and tenant, without regard to whether the lease was oral or written.<sup>4</sup>

The view that the lease was a sale of a term may have been sound before the nineteenth century, for leases then were primarily of agricultural land. The lessee could work the land at a profit even though the buildings were uninhabitable, and, being in possession of the entire building, could make repairs without venturing from areas he possessed. However, such a view is highly inadequate to protect the interest of today's urban slum tenant who, if he lacks habitable rooms and serviceable heating and plumbing, has little or nothing. In addition, the ability of the tenant to repair is limited by the size of the leased area (very small in slum apartments) and even by statute.<sup>5</sup>

Some nineteenth and twentieth century courts and legislatures have realized that changing social and economic conditions require changes in the legal structure of the landlord-tenant relationship.

## II. IMPLIED DUTY TO REPAIR

The overwhelming majority view today is in accordance with the common law position that no obligation to repair is placed upon the landlord, unless by force of an express covenant to do so.<sup>6</sup> The rule operates even though the premises become dangerous or untenable.<sup>7</sup>

Several jurisdictions have cut inroads into the harshness of this position through statutory enactment. Louisiana requires

3. The theory was that the rent continued to issue from the lessee's right to possession of the land. 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 267 (1926).

4. It flowed "as a natural consequence from the original character of a demise for years, as being not a conveyance but merely a covenant that the lessee should enjoy the land, a breach of which entitled him to the recovery of damages;" 1 H. TIFFANY, LANDLORD AND TENANT § 79, at 518 (1910).

5. See, e.g., S.C. CODE ANN. § 41-70 (1962), requiring the tenant to obtain written permission from his landlord before making "alterations" under pain of forfeiting the residue of the lease.

6. 3A G. THOMPSON, REAL PROPERTY § 1230, at 132 (repl. 1959). The most recent reiterations of the doctrine may be found in: *Stover v. Fechtman*, 222 N.E.2d 281 (Ind. App. 1966); *Goldstein v. Corrigan*, 405 S.W.2d 425 (Tex. Civ. App. 1966). *Payton v. Rowland*, 208 Va. 24, 155 S.E.2d 36 (1967).

7. See, e.g., *Mallard v. Duke*, 131 S.C. 175, 189, 126 S.E. 525, 530 (1924), in which the court appeared to rely on the tenant's knowing of the condition of the premises before entering into the lease.

the landlord to maintain the leased premises in good condition.<sup>8</sup> Georgia has expressly rejected the common law position in favor of the affirmative duty imposed by the civil law.<sup>9</sup> California requires the lessor of a building intended for human occupancy to put it in a condition fit for such occupation and to repair subsequent dilapidations.<sup>10</sup> The identical statutes of Oklahoma<sup>11</sup> and South Dakota<sup>12</sup> are similar in form to that of California.<sup>13</sup> New York imposes this duty upon owners of multiple dwellings.<sup>14</sup>

South Carolina imposes no implied duty to repair upon the landlord. The most recent statement to that effect is in *Connor v. Farmers & Merchants Bank*,<sup>15</sup> a tort action for personal injuries caused by the landlord's negligent repairing. Dictum in the opinion affirmed the lack of legal duty on the part of the landlord to keep the leased premises in repair, in the absence of an express covenant or contract to do so.<sup>16</sup> This rule, however, has been well settled in this state for many years.<sup>17</sup>

### III. IMPLIED WARRANTY OF FITNESS

Although the concept of implied warranty of fitness has seen much use in other areas in this century, its application in the realm of landlord and tenant differs very little from the common law. Generally, there is no obligation on the part of the landlord to see that the premises are, at the time of the demise, in a condition of fitness for the use which the tenant proposes, whether that be business or residence.<sup>18</sup> A tenant, like the pur-

8. LA. REV. STAT. §§ 2692-3(1870). It should be noted that this statute is based upon civil law which placed this duty on the lessor.

9. GA. CODE ANN. § 61-111 (1966). Upon failure of the landlord to perform, the tenant has been allowed to repair himself and set off reasonable expenses against the rent. *Daugherty v. Taylor*, 5 Ga. App. 773, 63 S.E. 928 (1909).

10. CAL. CIV. CODE §§ 1941-42 (West 1957), allowing the tenant, after notice and failure of the landlord to repair, to repair and deduct the expense, up to one month's rent, from the rent.

11. OKLA. STAT. tit. 41, §§ 31, 32 (1961).

12. S.D. CODE §§38.0409-10 (1939).

13. South Dakota and Oklahoma, however, place no limit on the expense in repairing which the tenant may deduct from the rent.

14. N.Y. MULT. DWELL. LAW § 78 (McKinney 1946).

15. 243 S.C. 132, 132 S.E.2d 385 (1963).

16. *Id.* at 139, 132 S.E.2d at 388.

17. *See, e.g., Williams v. Salmond*, 79 S.C. 459, 61 S.E. 79 (1907); *Reardon v. Averbuck*, 92 S.C. 569, 75 S.E. 959 (1912); *Cantrell v. Fowler*, 32 S.C. 589, 10 S.E. 934 (1889).

18. 3A G. THOMPSON, REAL PROPERTY § 1230, at 129 (repl. 1959).

chaser of a thing already in existence, is presumed to take only after examination. If he desires to protect himself in this regard he must exact from the landlord an express stipulation as to the condition of the premises.<sup>19</sup>

Most implied warranties in leases which exist today have been derived from legislation, generally of the type imposing a duty to repair noted *supra*. For example, Georgia has construed its repair statute<sup>20</sup> to imply a warranty that the premises are in good repair at the time they are leased.<sup>21</sup> California has derived an implied warranty of habitability through construction of a similar statute.<sup>22</sup>

There is one case law exception to this general rule. A majority of jurisdictions have imposed a warranty of fitness for furnished premises let for a short term.<sup>23</sup> This exception will not be explored in depth here, as this type of situation is encountered rarely, if ever, in the problem areas with which this paper is concerned. However, in 1931 the Minnesota court extended this exception to leases of multiple apartment buildings, without the aid of statutory enactment.<sup>24</sup> As explained, the common law theory operated on the supposition that the tenant would accept the premises and adapt them to his intended use. The court refuted this reasoning by declaring that the tenant in a multiple apartment building had insufficient control over his premises to adapt them. The tenant's remedy, as stipulated here, was to vacate, not to repair and deduct.<sup>25</sup>

Perhaps an even more impressive judicial landmark is *Pines v. Persson*.<sup>26</sup> Here the Wisconsin court liberally construed a statute<sup>27</sup> allowing the tenant to vacate if the premises became untenable by reason of the elements or any other cause. The court analyzed the situation:

19. *Id.* Cf. S. C. CODE ANN. § 10.2-315 (Supp. 1966), warranty of fitness for particular purpose.

20. GA. CODE ANN. § 61-111 (1966).

21. *Wilson v. Elijah A. Brown Co.*, 62 Ga. App. 898, 10 S.E.2d 219 (1940).

22. *Buckner v. Azulai*, 59 Cal. Rptr. 806 (1967). The court pointed out to follow the rule of no implied warranty of habitability would be inconsistent with legislative policy concerning housing standards.

23. 3A G. THOMPSON, REAL PROPERTY § 1230, at 136 (repl. 1959).

24. *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931).

25. *Id.* at 429, 239 N.W. at 149.

26. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

27. WIS. STAT. § 234.17 (1965). This statute, in accord with most of the others already mentioned, states its non-applicability if the condition was brought about through fault or neglect of the tenant.

Legislation and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus the legislature has made a policy judgment—that it is socially desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent “tumbledown” houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.<sup>28</sup>

Thus the Wisconsin court imposed an implied warranty of habitability which apparently applies to all leases of dwellings. The tenant in the instant case was allowed to vacate. Whether a remedy allowing the tenant to remain in possession (a much more meaningful solution for today's slum tenant) could be derived is open to speculation.

As do most jurisdictions, South Carolina follows the rule of *caveat emptor*, with no implied warranty of fitness or habitability. “The lessor turns over the property and the lessee takes it as it is turned over to him.”<sup>29</sup> In addition, legislation in this state denies the tenant the right to alter the leased premises without written permission from the landlord.<sup>30</sup> It could be argued that this statute negates the element of tenant control over the premises required for the majority rationale.<sup>31</sup>

One judicial precedent in this state presents a possible approach. In *Coogan v. Parker*,<sup>32</sup> the court stated the following doctrine: “[W]here there is a substantial destruction of the subject-matter, out of which rent is reserved . . . by an act of God or of public enemies, the tenant may elect to rescind, and

28. *Pines v. Persson*, 14 Wis. 2d 590, 595-96, 111 N.W.2d 409, 412-13 (1961).

29. *Williams v. Salmond*, 79 S.C. 459, 460, 61 S.E. 79 (1907).

30. S. C. CODE ANN. § 41-70 (1962).

31. *But see* *Dubay v. Cambridge Housing Authority*, 225 N.E.2d 374 (Mass. 1967), in which a similar restriction was held not to give the landlord sufficient control over the premises to impose an implied duty to repair.

32. 2 S. C. 255 (1871).

on surrendering all benefit thereunder be discharged from the payment of rent."<sup>33</sup> The similarity between this statement and the Wisconsin statute,<sup>34</sup> construed so liberally in *Pines*, is readily apparent. A fortiori, the reasoning of the *Pines* court could be followed toward deriving an implied warranty. Several problems are apparent. First, no legislation in this area has been passed in South Carolina, and most courts seem to feel the legislature must make the initial advancement;<sup>35</sup> second, the doctrine is limited to destruction by God or public enemies. However, *Coogan* might be used as a persuasive device, to suggest that judicial precedent for reform exists.

#### IV. MUNICIPAL HOUSING ORDINANCES

##### A. History

In 1954, the South Carolina legislature (perhaps responding to conditions required for federal housing funds) passed a bill<sup>36</sup> granting authority to cities of 5,000 or more population to enact municipal ordinances defining minimum housing standards.<sup>37</sup> Columbia was one of the first cities to enact a housing code under this legislative approval.<sup>38</sup> Its requirements have been upheld as a valid and reasonable exercise of the police power.<sup>39</sup>

##### B. Enforcement

Coercing private adherence to minimum housing standards is a complex process. It requires an administrative procedure efficient enough to detect violations and to prosecute individuals who fail to comply and an effective system of remedies that

33. *Id.* at 259.

34. WIS. STAT. § 234.17 (1965).

35. See, e.g., *Gustin v. Williams*, 62 Cal. Rptr. 838, 840 (1967).

36. S. C. CODE ANN. §§36-501 to 511 (1962).

37. *Id.* at § 36-503.

38. COLUMBIA, S. C., CODE §§ 7-27 to 38 (1957).

39. *Richards v. Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955). However, several catch-all phrases in the ordinance were stricken as not containing a "sufficiently definite standard." 227 S.C. at 555, 88 S.E.2d at 691. The court did quote with approval from *McNulty v. Owens*, 188 S.C. 377, 199 S.E. 425 (1938): "[T]he conclusion is inescapable that bad housing conditions have an adverse effect on the health and morals of the city of Columbia." 188 S.C. at 391, 199 S.E. at 431.

can secure the correction of existing violations and deter new offenses.

Ideally, housing codes should expressly prohibit the leasing of any premises which fail to meet minimum standards, with liability placed upon the landlord-owner. Unfortunately, few of them include such a provision. The Columbia Housing Code does not, although responsibility for repair under a commission directive is placed upon the "owner."<sup>40</sup>

The Columbia Housing Code provides that investigation of code violations be handled by a rehabilitation director with "such assistants as may be deemed necessary."<sup>41</sup> At present the staff consists of three inspectors and three neighborhood workers. The active case load being handled by this office as of March 1, 1968, totaled 691 cases. This staff-to-cases ratio seems to be the rule with similar investigating agencies in other urban areas.<sup>42</sup>

The Columbia Housing Code is oriented about the complaint inspection, although the rehabilitation director claims some area inspection is done. Complaint-initiated inspections alone are generally ineffective. First, they tend to focus only on the alleged violations. Second, because many violations inevitably go unreported, random enforcement results. This is particularly unfortunate because low-income tenants are often unaware of or do not avail themselves of enforcement services. Third, the uneven enforcement pattern reduces incentive to voluntary compliance. Nonetheless, a complaint system is essential; it provides an outlet for aggrieved individuals, a significant source of violation information, and a procedure for securing prompt inspection of particularly hazardous conditions.

In an area inspection program all dwellings in a designated area are systematically inspected and every violation is recorded. Area inspections seem the most effective way to discover all violations and to gain information about the quality of a city's housing inventory, in addition to retarding neighborhood deterioration. Detecting violations at earlier stages lowers repair costs. Competitive advantages of operating buildings at lower costs due to undetected violations is eliminated, and landlord

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40. COLUMBIA, S.C., CODE § 7-32 (1957).

41. *Id.* at §7-29.

42. For example, in 1964 the Washington, D. C., Housing Division, with 35 inspectors, handled 10,313 cases.



responsiveness is improved. Supplementing complaint inspection with an efficient area inspection appears essential.<sup>43</sup>

The Columbia Housing Code provides that a complaint may be filed with the rehabilitation director by "a public authority or by at least five residents of the city."<sup>44</sup> However, petitioning the rehabilitation director does not necessarily benefit the indigent tenant. Under this state's thirty day notice statute,<sup>45</sup> a tenancy from month to month may be ended by either party. No reason is required to gain an eviction order if this procedure is followed. Obviously, a petitioning tenant is going to be subject to retaliatory eviction<sup>46</sup> long before any real action is taken on his petition.<sup>47</sup> The landlord may decide to make minimum repairs later and re-rent. Generally, any show of compliance by the owner is sufficient to satisfy the rehabilitation director. However, the average cost of repairing dwellings in this low-rent class to meet minimum standards is \$750.00, a fact which encourages many slum landlords to let the premises lie idle.<sup>48</sup>

The availability of low-rent housing in Columbia will not encourage any indigent tenant to risk losing his shelter. The \$20.00-\$37.50 per month housing units are constantly filled, according to the Columbia Rehabilitation Director. In addition, over seven hundred applicants are currently on the waiting list for public housing in Columbia.

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43. Perhaps an even more serious problem is the time required to attain satisfactory rehabilitation or, in the alternative, to impose a penalty for non-compliance with a housing office directive. A conservative estimate of the period necessary to close a case, assuming the landlord utilizes all the avenues of delay available to him under normal housing code procedure, is seven months. The likelihood of court action is almost non-existent. The Columbia Rehabilitation Director could cite only eight occasions on which his office has carried a case to court, over approximately 6 years.

44. COLUMBIA, S. C., CODE § 7-31 (1957). The Columbia Rehabilitation Director includes the local Legal Aid Service Agency under the "Public Authority" heading. In addition, his office will allow a petition to be filed by an individual tenant.

45. S. C. CODE ANN. § 41-63 (1962).

46. Discussed in detail, at p. 295.

47. In fact, some Columbia landlords have been able to rid themselves of complaining tenants without even going through the eviction procedure. They use the following method: while the rehabilitation director has no power to demolish, he does have the authority to vacate a building when the owner refuses to comply; therefore, when the owner is served with a repair, vacate, or demolish order, he does nothing. The rehabilitation director then vacates the premises, in effect evicting the complaining tenant.

48. Because of the time lapse between detection of a violation and final disposition of the case, many owners refrain from compliance for months. Generally, they are not penalized for delaying and any penalty imposed is suspended upon eventual compliance. Obviously, a more streamlined procedure is needed. See Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966).

### C. Implied Warranty Based Upon Columbia Housing Code

Although no section of the ordinance explicitly prohibits the leasing of dwellings which fail to comply with the minimum standards set forth,<sup>49</sup> it may still be argued that the legislature<sup>50</sup> and municipality have imposed certain duties upon the property owner which have rendered the common law rule of *caveat emptor* obsolete. To follow the old rule of no implied warranty of habitability would be inconsistent with the current policy underlying housing standards, *i.e.*, the need and social desirability of adequate housing for people, the quenching of urban blight, etc.<sup>51</sup> Therefore it may be contended that a contractual obligation is imposed upon the landlord by way of an implied covenant that the premises meet the minimum requirements of the Code.<sup>52</sup> It should be noted that no express or exclusive remedy is made available to any individual in the Code itself.

*Timmons v. Wood Products Corp.*,<sup>53</sup> one of the leading landlord and tenant cases in South Carolina, held that no liability existed on the part of the landlord for personal injuries to his tenant caused by a defect in the premises, with six exceptions. One of those enumerated is when the landlord breaches a statutory duty.<sup>54</sup> The Columbia Housing Code, authorized by the legislature and approved by the courts, may constitute such a statute. However, *Timmons* may have been referring only to statutes which give the tenant an express cause of action.

Freedom of contract is a particularly sacred concept to many courts. Very adhesive "bargains" are usually required to force judicial invasion into this area. The transaction in which a tenant, lacking any bargaining power because of a housing shortage, is forced to accept premises in a rundown condition smacks strongly of adhesion. Freedom of contract has been limited in other areas in which public policy required that adhesive abuse be eliminated. For example, a borrower may not contract

49. COLUMBIA, S. C., CODE § 7-35 (1957).

50. S. C. CODE ANN. § 36-503 (1962), authorizing enactment of the housing ordinances, and § 36-505, suggesting minimum standards.

51. See COLUMBIA, S. C., CODE § 7-26 (1957), in which the conditions with which the ordinance is concerned are described as "dangerous or detrimental to the health, safety or morals or . . . inimical to the welfare of the residents of the city."

52. This approach has been used with success in the District of Columbia. See *Whetzel v. Jeff Fisher Management Co.*, 282 F.2d 443 (D.C. Cir. 1960).

53. 164 S.C. 361, 162 S.E. 329 (1932).

54. *Id.* at 374, 162 S.E. at 333.

away the defense of usury.<sup>55</sup> Waiver by an employee of a statutory minimum wage is not permitted.<sup>56</sup> If the warranty suggested herein is implied, the tenant's occupying the premises and paying the rent should not be construed a waiver of any breach of the warranty.

If an implied warranty of habitability or fitness or an implied duty to repair can be established, there remains the matter of remedies for their breach. The tenant would probably be allowed to abandon the premises without further liability for rent (in effect rescinding the lease) but abandonment is not usually the relief desired by the slum tenant because the housing shortage effectively curtails his freedom of movement. Allowing the tenant to remain in possession of the defective premises, continue paying the rent, and sue for damages would be a meaningful remedy. The damages might be the cost of repairing the dwelling to meet the minimum standards of the housing code. This question should be considered in the light of *Timmons*:

[I]f the premises become dangerous to life or limb, the tenant, rather than expose himself and the members of his household to such dangers, may, upon failure of the lessor to perform his engagement to repair, (1) rescind the contract and abandon the premises; (2) make the repairs himself and deduct the expense thereof from the rent, or recover the same upon a counterclaim in an action for rent . . . (3) occupy without repair, and recoup such damages as are ordinarily incident to a breach of contract by counterclaim in the landlord's action for rent . . . or (4) sue for damages for breach of contract.<sup>57</sup>

These remedies are for breach of an express covenant to repair, but arguably they would apply for breach of an implied covenant to repair or implied warranty of fitness or habitability.

## V. COVENANT OF QUIET ENJOYMENT

As early as the fifteenth century it was recognized that the relation of landlord and tenant gave rise to the implied covenant of quiet enjoyment.<sup>58</sup> The legal implication of the covenant is

55. 6A A. CORBIN, CONTRACTS § 1515, at 731 (1962).

56. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945). See also the unconscionability theory of the Uniform Commercial Code. S. C. CODE ANN. § 10.2-302 (Supp. 1966).

57. *Timmons v. Wood Prods. Corp.*, 164 S.C. 361, 367, 162 S.E. 329, 331 (1932).

58. 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 251 (1926).

that the landlord has an adequate title to the estate created by the lease and that he will permit the tenant to enjoy, without disturbance or interruption, the interest, title, and privilege demised, subject to all such rights as are expressly or by natural implication reserved to the lessor.<sup>59</sup> The covenant is implied from the landlord-tenant relationship in the majority of jurisdictions today.<sup>60</sup> No cases concerning covenants for title in leases have ever arisen in South Carolina. However, it may be assumed with some assurance that the majority view will be followed and this covenant implied, whether the lease be oral or written.

An actual eviction of the tenant by the landlord or anyone else with paramount title is a breach of the covenant. Actual evictions are rarely encountered in the indigent tenant situation, except where the landlord is given a statutory right to evict, as when the tenant refuses to pay rent.<sup>61</sup>

The early cases involved an actual physical ouster,<sup>62</sup> but eventually it became obvious that the landlord could make the tenant's position so untenable that he would be forced to abandon the premises and that, in such a situation, the tenant should have the same remedies as for actual eviction. An act by the landlord which essentially deprives the tenant of beneficial use or enjoyment of a part or of the whole of the premises is a constructive eviction.<sup>63</sup> Yet herein lies the stumbling block for the indigent tenant. There can be no constructive eviction, under the majority view today, unless the tenant surrenders or abandons the premises within a reasonable time after the landlord's acts.<sup>64</sup> As noted, abandonment is not the remedy desired by the slum tenant.

Two reasons have generally been given for requiring abandonment in constructive eviction situations. First, the basis of constructive eviction is the untenable or uninhabitable condition of the premises. Therefore, it is reasoned that, if the premises are uninhabitable, the tenant would not remain in possession, and his remaining in possession belies any claim of uninhabitability. This line of reasoning may be refuted by showing a housing

59. 3 G. THOMPSON, REAL PROPERTY § 1129, at 471 (repl. 1959).

60. *Id.* at 468.

61. *See, e.g.*, S.C. CODE ANN. § 41-65 (1962).

62. *See, e.g.*, Avery v. Dougherty, 102 Ind. 443, 2 N.E. 123 (1885).

63. 3 G. THOMPSON, REAL PROPERTY § 1132, at 492 (repl. 1959).

64. *Id.*

shortage to be the reason for the tenant's unwillingness to abandon. This approach has been used successfully in New York, where the court took judicial notice of the housing shortage and allowed the defense of constructive eviction, without abandonment, to an action for rent.<sup>65</sup> Information from the Columbia Urban Rehabilitation Director suggests that an equal shortage of low-rent housing exists in Columbia.

The second reason for requiring abandonment is more difficult to circumvent. It is felt that the tenant should not be able to avoid payment of the rent reserved while retaining possession under the lease. For this reason, constructive eviction without abandonment is generally unsuccessful as a defense to an action for rent.<sup>66</sup>

As mentioned, no cases involving covenants for title in leases have ever arisen in South Carolina. Therefore, constructive eviction has never been considered. However, several rules involving the covenant of quiet enjoyment as it applies to general conveyances of realty have been laid down. One of the leading cases is *Jeter v. Glenn*,<sup>67</sup> in which it was noted that "[o]f a covenant of quiet enjoyment, there is no breach before eviction or its equivalent."<sup>68</sup> This language, along with a dearth of cases involving this covenant in leases, might provide an opening for judicial inroads into this area.

The extent or character of the interference with enjoyment necessary to constitute a breach of the covenant is a question on which the cases do not present any harmonious rule. It has been said that the landlord, without being guilty of an actual physical disturbance of the tenant's possession, may so interfere with his enjoyment as to be liable in damages.<sup>69</sup> There would seem to be no reason, then, why any interference by the landlord with the tenant's right to enjoyment should not be considered a breach of the covenant, without regard to whether the tenant is thereby physically dispossessed or compelled to move. Therefore, when the premises are in a state of disrepair not sufficient for constructive eviction, the tenant should still be able to

65. *Majen Realty Co. v. Glotzer*, 61 N.Y.S.2d 195 (N.Y. Mun. Ct. 1946).

66. *See, e.g., Ackerhalt v. Smith*, 141 A.2d 187 (D.C. Mun. Ct. App. 1958); *Key v. Swanson*, 113 Okla. 287, 241 P. 490 (1925); *Angelo v. Deutser*, 30 S.W.2d 70 (Tex. Civ. App. 1930).

67. 9 Rich. L. 374 (S.C. 1856).

68. *Id.* at 378 (emphasis added).

69. *Keating v. Springer*, 146 Ill. 481, 34 N.E. 805 (1893); *Boyer v. Commercial Bldg. Inv. Co.*, 110 Iowa 491, 81 N.W. 720 (1900).

bring an action for breach of the covenant. There is a conflict in the cases, but a substantial number have sanctioned recovery.<sup>70</sup>

If it be assumed that any interference by the landlord is a breach of the covenant of quiet enjoyment for which the landlord must respond in damages, it does not follow that the tenant may treat any such act as terminating the lease and relieving him of the duty to pay rent. For this an eviction, either actual or constructive, is necessary. Covenants in a lease are regarded as independent; *i.e.*, breaching the covenant of quiet enjoyment does not relieve the tenant of the covenant to pay rent.<sup>71</sup> The rule that eviction is a defense to rent really operates as an exception to this rule.<sup>72</sup> These lesser breaches of the covenant, however, should give the tenant an independent cause of action. Non-compliance with any of the minimum standards of the Columbia Housing Code, although not reaching an untenable condition, would constitute such a minor breach of the covenant. Thus obstacles in the way of a plea of constructive eviction could be circumvented and the desired result reached by seeking affirmative relief for interference with enjoyment.<sup>73</sup> Of course, these lesser interferences might also be used a recoupment,<sup>74</sup> set-off, or counterclaim<sup>75</sup> in an action by the landlord for rent. If the tenant remains in possession the measure of damages would be the difference between the value of the use of the property with and without the interference. When interposed as a recoupment, set-off or counterclaim to an action for rent, the rent claimed can be reduced by the amount of damages sustained by the interference, which might be the difference in rental value of the premises in repair and in disrepair or, alternatively, the cost of repairs.<sup>76</sup>

Most cases supporting the proposition that interference with possession and enjoyment is actionable involve positive acts of interference by the landlord.<sup>77</sup> But there appears to be no

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70. See *Metropole Const. Co. v. Hartigan*, 83 N.J.L. 409, 85 A. 313, 315 (1912). See also 1 AMERICAN LAW OF PROPERTY § 3.50, at 278 (A. J. Casner ed. 1952).

71. AMERICAN LAW OF PROPERTY § 3.50, at 279 (A.J. Casner ed. 1952).

72. *Id.*

73. See *Boyer v. Commercial Bldg. Inv. Co.*, 110 Iowa 491, 81 N.W. 720 (1900).

74. *Keating v. Springer*, 146 Ill. 481, 34 N.E. 805 (1893), *cf.* *Williamson v. May*, 44 Ga. App. 532, 162 S.E. 162 (1932).

75. *Cf.* *Timmons v. Wood Produs. Corp.*, 164 S.C. 361, 367, 162 S.E. 329, 331 (1932).

76. *Id.*

77. See, *e.g.*, *Keating v. Springer*, 146 Ill. 481, 34 N.E. 805 (1893).

reason why failures, omissions, and neglect should not also give rise to an action for breach of the covenant. Therefore, in a jurisdiction which imposes the duty of repair or maintenance upon the landlord by statute or ordinance, the landlord's failure to repair or to meet minimum standards of habitability should constitute a breach of the covenant of quiet enjoyment.

## VI. RETALIATORY EVICTION

A tenant who attempts to better his housing conditions by affirmative court action or by seeking enforcement of local housing regulations may find himself the object of retaliatory action by his landlord. The most frequently used weapon of the landlord in retaliation is eviction.

The eviction procedure may also be utilized to render moot an appeal on a novel defense by the tenant in an action for possession or rent, or perhaps on a cause of action of first impression.<sup>78</sup> Usually the period necessary to terminate the tenancy after notice will have passed before any appeal is heard<sup>79</sup> and, probably, even before the action is scheduled for its original hearing.<sup>80</sup> The landlord will then be entitled to possession. This is a particularly effective means of preventing the abrogation of outdated common law principles at the appellate level. One reason given supporting this system has been that to restrain the landlord from taking legal means to regain possession of leased premises to which he is entitled would be an unwarranted deprivation of his property.<sup>81</sup>

In South Carolina most tenancies involving slum dwellers are of the month to month variety. This type of tenancy may be terminated by either party upon thirty days written notice.<sup>82</sup> When this period has elapsed, the landlord may bring ejectment proceedings against the tenant if he has not surrendered pos-

78. An example is a suit for damages for breach of an implied warranty of habitability.

79. See note 43 *supra*.

80. The majority of slum tenancies in this country are classified as tenancies from month to month. A few may be classified as tenancies at sufferance (or at will). In either case, almost invariably only thirty days written notice is required to terminate the tenancy (occasionally twenty days for tenancies at will. S.C. CODE ANN. § 41-64 [1962]). No reason for termination under this procedure is required.

81. Schoshinski, *Remedies of the Indigent Tenant: Proposal for change*, 54 GEO. L.J. 519, 542 (1966).

82. S. C. CODE ANN. § 41-63 (1962).

session.<sup>83</sup> The tenant may contest the ejection, in which event the magistrate having jurisdiction shall hear the case as any other civil case, with similar procedures.<sup>84</sup> The tenant is provided with an action for damages against the landlord if he is wrongfully dispossessed.<sup>85</sup>

The Columbia Housing Code does not give the tenant an express right of action against the landlord to correct housing violations. It cannot be doubted, however, that the tenant is one of the persons whom the ordinance seeks to protect.<sup>86</sup> The tenant is, in a sense, given a remedy in that he is allowed to petition the rehabilitation director.<sup>87</sup> To insure the enforcement of the ordinance, provisions for protecting the tenant from reprisal for petitioning could be read into the Code. It would seem that the public policy underlying enactment of the ordinance would be utterly defeated by permitting landlords to intimidate petitioning tenants.

Several constitutional arguments might be used to deter retaliation by the landlord. The 1871 Civil Rights Act provides, in part, for civil liability for any person who "under color of any statute or regulation of any state subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."<sup>88</sup> In particular, the first amendment allows no law which would abridge the right of the people to petition the government "for a redress of grievances."<sup>89</sup> This prohibition is applicable to the states,<sup>90</sup> but a sufficient nexus with governmental power has been required,<sup>91</sup> which would probably not include the private acts of the landlord. However, judicial enforcement of private action has been found sufficient as "state action."<sup>92</sup> In addition, recent opinions of the United States Supreme Court suggest that the fourteenth amendment prohibitions may be extended to purely private acts.<sup>93</sup>

83. *Id.* at § 41-101.

84. *Id.* at § 41-106 to 112.

85. *Id.* at § 41-114.

86. See COLUMBIA, S. C., CODE § 7-26 (1957).

87. COLUMBIA, S. C. CODE § 7-30 (1957), See also note 44 *supra*.

88. Act of April 20, 1871, ch. 22, 1, 17 Stat. 13.

89. U. S. CONST. amend. I.

90. *Id.* at amend. XIV, § 1.

91. See, e.g., Civil Rights Cases, 109 U.S. 3 (1883).

92. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

93. *United States v. Guest*, 383 U.S. 745, 782 (1966).



Another constitutional avenue may be open to the tenant. The Columbia Housing Code, in accordance with similar ordinances, imposes criminal penalties for failure to comply with directives of the rehabilitation director ordering compliance with minimum standards.<sup>94</sup> The tenant may have a constitutional right to inform the city of non-compliance with minimum standards. The United States Supreme Court has said:

The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the constitution, but arises out of the creation and establishment by the constitution itself of a national government, paramount and supreme in its sphere of action. . . .<sup>95</sup>

Therefore, the tenant may have the correlative right not to be injured for having availed himself of the basic right to report violations of the ordinance. The interest at stake here is not only that of the citizen in his freedom to provide information to the authorities, but also that of the government in the free and unimpeded access to such information. Intimidation of the sources of information would injure the interest of the government in the effective enforcement of the laws. In addition, housing codes were enacted primarily to protect citizens from unsafe, unsanitary conditions. To permit landlords to evict tenants who avail themselves of the remedies provided in these codes frustrates this public policy.<sup>96</sup>

When the landlord gives notice to terminate the tenancy in order to punish the tenant, the situation is difficult. Although various grounds have been suggested here for defending against a retaliatory eviction, the problem of proving that notice has been given *in retaliation* would appear to be insurmountable once the landlord learns to give it without divulging the reason. The only real solution is legislative amendment of the summary possession statutes which would provide for a presumption of retaliation when eviction follows a complaint to the housing office by the tenant. This should give the tenant more assurance of permanency.

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94. COLUMBIA, S. C., CODE § 7-35 (1957).

95. *In re Quarles*, 158 U.S. 532, 536 (1895); *accord*. *Motes v. United States*, 178 U.S. 458 (1900).

96. *See* *Habib v. Edwards*, Civ. No. LT 75895-65, D.C. Ct. Gen. Sess., Landlord and Tenant Branch (Oct. 28, 1965).

## VII. CONCLUSION

Slum housing conditions demand public interest and concern. Adequate housing for the indigent tenant depends upon the maintenance of the leased premises in a habitable state, or at least in a condition that meets housing code requirements, at the time of letting and throughout the term. Solutions to this problem within the present framework of the law have been suggested here. In addition, certain administrative reforms, not discussed in this paper, would certainly facilitate more vigorous enforcement of housing regulations. However, the only adequate method of properly balancing the rights of landlord and tenant so as to provide the indigent tenant with rights of action securing the interests set forth here is statutory reformation of the landlord-tenant framework. It is sincerely hoped that such reform will be forthcoming.

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